83-262

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CHEECHAKO LEASING COMPANY,
Petitioner,

VS.

WORKERS' COMPENSATION APPEALS BOARD
and JUNE FRED ROSE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Whether the constitutional obligation to give full faith and credit to a final decision of the Alaska Workmen's Compensation Board precludes relitigation of factual issues therein resolved, and bars any further proceedings, before the California Workers' Compensation Appeals Board.

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JURISDICTION

Respondent Workers' Compensation Appeals Board of the State of California (hereinafter sometimes "Board") entered its Decision After Reconsideration on July 13, 1982, rejecting petitioner's motion, based upon the Full Faith and Credit Clause (Article IV, Section 1) of the United States Constitution, to dismiss respondent June Fred Rose's application for workmen's compensation benefits [Appendix A].

Petitioner thereupon sought review in the manner, and within the time, which California law prescribes; first by Petition for Writ of Review filed in the Court of Appeal, First Appellate District on August 27, 1982 (denied February 28, 1983, Appendix B); thence by Petition for

Hearing filed in the Supreme Court of California on March 9, 1983 (denied May 19, 1983, Appendix C);

Jurisdiction to review this matter on petition for writ of certiorari is vested in this Court by Section 1257(3) of Title 28, United States Code and by Section 2101(c) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, § 1 of the United States Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and, judicial Proceedings of every other State".

The elements of a compensable workmen's compensation claim in California are embodied in Labor Code § 3600 [Appendix E, pages 56-57].

The elements of a compensable workmen's compensation claim in Alaska are embodied in Alaska Statutes § 23.30.265(13) [Appendix F, page 63]

STATEMENT OF CASE

On August 11, 1976 respondent June Fred Rose (hereinafter sometimes "Rose") filed an Application for Adjudication of Claim with the California Workers' Compensation Appeals Board seeking benefits from petitioner for a heart attack suffered in Alaska on March 29, 1976, allegedly resulting from work-related stress while employed by petitioner in that State.

On September 30, 1976 Rose filed an "Application for Adjudication of Claim" with the Alaska Workmen's Com-

pensation Board seeking benefits from petitioner for the same heart attack and alleging the same cause.

On May 3, 1977 Rose requested the California Board to remove his claim from the calendar, Rose having chosen to proceed before the Alaska Board [Appendix A, page 2].

On July 4, 1979 the Alaska Board heard Rose's claim on the merits. The principal issue at this hearing was "whether or not the heart attack . . . is job related or is compensable" [Appendix A, page 3; D, page 14].

On September 26, 1979 the Alaska Board entered its "Preliminary Finding of Decision and Order" rejecting Rose's claim, having determined that his injury was not job related [Appendix A, page 3]. On May 5, 1980 the Alaska Board entered its "Final Decision and Order" confirming its decision [Appendix A, page 3].

Rose did not pursue the review from this decision for which Alaska law provides [Appendix A, page 3]; the decision therefore became final not later than June 7, 1980 (Alaska Statutes, Section 23.30.125) [Appendix F, page 60].

On June 10, 1980, at a hearing on Rose's California claim, the Board agreed to decide petitioner's motion to dismiss for lack of jurisdiction under the Full Faith and Credit Clause (Article IV, Section 1) of the United States Constitution, based on the prior Alaska decision [Appendix A, page 3]. Petitioner and Rose thereafter submitted briefs on this issue.

On October 3, 1980 the Board filed its combined "Finding on Jurisdiction", "Finding of Fact", "Order" and "Opinion on Decision" in which it determined it had the power to

proceed with Rose's application, thereby denying petitioner's motion to dismiss [Appendix A, page 1].

On October 15, 1980, within the prescribed time, petitioner filed its "Petition for Reconsideration" of the Board's decision, a prerequisite to appellate review of the issues petitioner raised in its motion to dismiss (California Labor Code Section 5901) [Appendix E, page 58].

On July 13, 1983 the Board issued its "Decision After Reconsideration" in which it determined that it had jurisdiction to proceed on Rose's application notwithstanding the Alaska decision [Appendix A].

REASON FOR GRANTING PETITION

In *Thomas v. Washington Gas Light Company* 448 U.S. 261 this Court held that a workmen's compensation award under the laws of one jurisdiction does not necessarily bar a supplemental award against the same employer for the some injury in a second jurisdiction.

Petitioner has found no decision of this or any other court, however, in which an employer successfully contests a workmen's compensation claim on the merits and the claimant thereafter institutes a new proceeding against the same employer for the same injury in a second jurisdiction.

Given the far-flung operations of modern industrial enterprises, employee injuries are often potentially compensable in several jurisdictions.

Thomas struck a balance between the parochial interests of the several states and the unifying imperative of the Full Faith and Credit Clause. What the Court balanced, however, were the factors mitigating for and against successive workmen's compensation awards. The Court was

not asked to recognize a claimant's right to relitigate a prior adverse decision.

Nevertheless, *Thomas* reaffirmed—unanimously—"the unexceptionable full faith and credit principle that resolutions of factual matters underlying a judgment must be given the same res judicata effect in the forum State as they have in the rendering State" (448 U.S. 280, plurality opinion; see also concurring opinion, 448 U.S. 287-288 and dissenting opinion, 448 U.S. 291-292).

Thus, the Full Faith and Credit Clause forecloses a workmen's compensation tribunal for reexamining issues of fact once resolved in a contested proceeding before the workmen's compensation tribunal of a sister state under whose law such a resolution is res judicata. Respondents, however, propose just such a reexamination of the Alaska Workmen's Compensation Board decision whose findings are res judicata.

1. California's "Highest Court" Has Rendered Its "Final Judgment or Decree" for Purposes of Certiorari Jurisdiction

Decisions of the California Workers' Compensation Appeals Board are subject only to discretionary review by special writ from the California appellate courts and only after the Board itself has passed on a petition for reconsideration. California Labor Code Sections 5810, 5900, 5901, 5950 [Appendix E, pages 57-59]; *Loustalot v. Superior Court* (1947) 30 C.2d 905, 908.

The Court of Appeal and California Supreme Court declined to exercise their power of review; the Board's Decision on Reconsideration [Appendix A] is therefore

that of the "highest Court of the State in which a decision could be had" for purposes of 28 U.S.C. § 1257. *Adam v. Saenger* (1938) 303 U.S. 59, 61.

The Board decided the federal question presented in this petition as a threshold issue whose resolution determined its authority to proceed to the merits of Rose's claim. Petitioner, having exhausted its avenues of State review, faces two circumstances which call for a writ of certiorari.

First, petitioner was obliged to invoke the Full Faith and Credit Clause to bar Rose's claim before the Board reached the merits, or waive it under state law, *Busick v. WCAB* (1972) 7 C.3d 967, 977 and moot it before this Court. This, petitioner did with its motion to dismiss.

Second, California law is unclear on the consequences of failure to seek review of an adverse Board decision at the first opportunity:

> ". . . if a Board order determinative of a threshold issue is subject to review despite remand, failure to seek review at that time might preclude a subsequent petition on that issue". *Safeway Stores v. Workmen's Compensation Appeal Board* (1980) C.A.3d 528, 532.

Finally, quite apart from any ultimate result on the merits, the very occurrence of the California proceeding with the imminent reexamination of issues already resolved in Alaska is at cross purposes with the object of the Full Faith and Credit Clause. Its very occurrence—impossible to undo—will to that extent moot post judgment review even were such available. As *Thomas* recognizes, avoidance of the resulting waste and vexation is a principal object of the Full Faith and Credit Clause [448 U.S. 283-284,

plurality opinion; 448 U.S. 288-289, concurring opinion; 448 U.S. 293-294, dissenting opinion].

In short, Rose's California action places petitioner in a dilemma: having raised the full faith and credit issue at the first opportunity[1], if petitioner failed to seek review before the Board proceeded to the merits it risked forfeiture of any review, state or federal. Any avenue which peitioner failed to pursue at the threshold, *Safeway Stores* might later foreclose. Accordingly, having exhausted all state remedies, petitioner arrives at this Court.

Besides the caveat in *Safeway Stores,* a hearing on the merits would moot one of the claims before this Court: that the very hearing itself, apart from a possible adverse result, is a violation of the Full Faith and Credit Clause.

These circumstances force petitioner to address this Court before any state hearing on the merits. Yet U.S.C. § 1257 grants this Court certiorari jurisdiction only from "final judgments or decrees" of state courts.

In view of the above, petitioner falls squarely within the third jurisdictional category delineated in *Cox Broadcasting v. Cohn* 420 U.S. 469, 481:

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the State Courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will

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[1]The Alaska decision became final only on June 7, 1980; petitioner raised the full faith and credit issue before the California Board on June 10, 1980 [Appendix A, page 2-3].

> be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The court has taken jurisdiction in these circumstances prior to completion of the case in the State Courts."

The issues of fact resolved in Alaska combined with the virtual identity of the substantive and procedural workmen's compensation laws of Alaska and California (presently addressed) dictate a result on the merits in California identical with the result in Alaska. This, in turn, triggers the fourth jurisdictional category delineated in *Cox Broadcasting*, 420 U.S. 482-483:

> ". . . . where reversal of the State Court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation."

Thus, the Board's own bifurcation and separate decision of the full faith and credit issue effectively created a separate "final judgment or decree" within the meaning of 28 USC § 1257, and *Cox Broadcasting*.

2. The Full Faith and Credit Effect of a Judgment In No Way Depends Upon Congruence Among the Laws of the Several States

The *Thomas* plurality, citing and quoting *Chicago, R.I.&P. Ry Company v. Schendel* 270 U.S. 611, 616-617, reiterates the "unexceptionable full faith and credit principle that resolution of factual matters underlying a judgment must be given the same res judicata effect in the forum state as they have in the rendering state" (448 U.S. 280-281). The plurality states that "the Minnesota courts could not have granted relief under the FELA and also respected the factual finding made in Iowa" (448 U.S. 281).

In *Schendel* the "factual matter" whose resolution barred a subsequent FELA suit was "the character of the commerce" in the course of which a railroad workman was killed. Decedent's widow filed a FELA suit in Minnesota, necessarily predicated on decedent's death in interstate commerce. She contested the jurisdiction of the Iowa Industrial Commissioner, in a proceeding brought by the railway company, for the same reason: that the injury occurred in interstate commerce (270 U.S. 614). The Iowa Industrial Commissioner, applying Iowa law, determined that the decedent, when killed, was engaged in intrastate commerce (apparently a requisite to his jurisdiction) and entered an award for the widow, on whose appeal an Iowa court affirmed. The Commissioner's finding of intrastate commerce precluded the subsequent FELA suit (270 U.S. 616-617).

The *Schendel* court twice states the dispositive principle:

> "The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate

commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same. That the Iowa Court had jurisdiction to entertain the proceeding and decide the question under the state statute, cannot be doubted. Under the federal act, the Minnesota Court had equal authority; but the Iowa Judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as res judicata . . ."

"The Iowa Court, under the Compensation Law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified . . . the judgment upon the point was nonetheless conclusive as res judicata because it was rendered under the state Compensation Law, while the action in which it was pleaded arose under the federal liability law" (270 U.S. 616-617).

These statements implicitly recognize that "factual matters" for res judicata purposes are in reality the result of the application of law to fact. What a layman calls "facts" a jurist calls "evidence", relevant only in terms of some law applied to resolve a specific dispute. Hence, "relevant evidence" (e.g. Federal Rules Evidence 401) and the requisite of relevance to admissibility (e.g. Federal Rules Evidence 402).

To illustrate, assume the *Schendel* facts, but suppose that the Iowa Compensation Law ignores the "character

of the commerce" in which the employee is engaged when injured; it requires only that the claimant work within the geographical boundaries of Iowa for five consecutive days immediately preceding the injury. Because the decedent qualifies, the Iowa Commissioner awards compensation, rejecting the widow's argument that decedent was engaged in interstate commerce and that FELA therefore preempts Iowa law, but making no finding on the "character of the commerce", this being irrelevant under the Iowa law.

The Iowa decision would seem to leave open any FELA remedies so long as the same underlying facts, alone or in conjunction with others irrelevant under the hypothetical Iowa law, placed the worker in interstate commerce when injured. The "factual finding" of intrastate commerce would never materialize to bar the subsequent FELA action.

Thus, the finding in *Schendel* of intrastate commerce is not merely a random conglomeration of evidentiary facts. It is a conclusion of law—Iowa law—based on those facts. That conclusion, not the bare facts, is what barred the subsequent FELA action—an action brought in another state applying different law.[3]

Conspicuously absent from *Schendel* is any suggestion that the Minnesota court or this Court had before it the evidence from the Iowa proceeding or that, apart from the finding of intrastate commerce, the record of the Iowa proceeding showed a lack of FELA jurisdiction. The Court's

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[3]This hypothetical is loosely based on a discussion of *Schendel* in Sterk, *Full Faith and Credit, More or Less, to Judgments: Doubts About Thomas v. Washington Gas Light Company*, 69 Georgetown Law Journal, 1329, 1353-1354. See also *United States v. Moser* 266 U.S. 236, 242.

opinion recites nothing more than that the FELA defendant offered certified copies of the Iowa judgment (reciting the finding) and Compensation Law (270 U.S. 613).

Also absent from *Schendel* is any comparison of the Iowa Compensation Law with FELA beyond the bare juxtaposition of "intrastate" with "interstate" commerce. The Court makes no effort whatever to demonstrate that the result in Minnesota under FELA would, in the first instance, have been consistent with the result in Iowa under Iowa law.

Thus, how the forum state would, in the first instance, have resolved the case is of no significance for full faith and credit purposes. Indeed such an inquiry is contrary to the very principle of full faith and credit. The question is rather, how did the rendering state in fact resolve it?

Given the requisite subject matter and personal jurisdiction, the competence of each tribunal to conclusively determine the issue in the first instance is coextensive. Each, were it first to decide, would bind the other, the full faith and credit obligation being reciprocal among the several states.

Precisely because the Constitution reserves to each state the power to legislate and adjudicate—make and enforce law— outside of those subjects delegated to the central government, however, it follows inexorably that the full faith and credit effect of the "factual determination" does not—cannot—depend on uniformity among the relevant laws, substantive or procedural, of the respective jurisdictions. To so confine the reach of the full faith and credit principle would, by empowering each state to reexamine the merits of disputes the others have resolved, confine the efficacy of virtually all judgments to the jurisdictions which rendered them.

3. The Alaska Workmen's Compensation Board Decision Bars the Present California Workmen's Compensation Appeals Board Proceeding

Respondents seek to circumvent the full faith and credit principle by arguing that Alaska imposes a more rigorous standard of proof than California on the decisive issue: the causal connection between work activities and injury. Thus, respondents' argument is premised on the very question which the Full Faith and Credit Clause forecloses: how would California's tribunal have decided the case in the first instance?

Petitioner notes in passing that Rose, with legal counsel in both Alaska and California, filed his first claim in California but chose, however, to proceed in Alaska and to seek no review of the adverse decision there. Petitioner, of course, had no such choice.

Even were the comparison critical to the application of the Full Faith and Credit Clause, it is by no means clear that Rose's burden is easier in California than Alaska. Alaska law defines a compensable injury as follows:

> "'Injury' means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection which arises naturally out of the employment or which naturally or unavoidably results from an accidental injury . . ." (Alaska Statutes § 23.30.265(13)) [Appendix F, page 63].

Alaska law presumes a connection between work and injury:

> "In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) The claim comes within the provision of this

chapter . . ." (Alaska Statutes § 23.30.120) [Appendix F, page 60].

California law defines a compensable injury as follows:

(a) Liability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

. . .

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence". (California Labor Code § 3600) [Appendix E, page 56].

California law does not presume, contrary to Alaska law (Alaska Statutes § 23.30.120), a connection between work and injury. Rather, it places the burden of proving the work/injury connection squarely on the claimant, resolving "all reasonable doubts" in the employee's favor. *Lamb v. WCAB* (1974) 11 C.3d 274, 280. Alaska law resolves "any doubt" on the issue in the claimant's favor. *Beauchamp v. Employers Liability Assurance Corporation* (1970) 477 P.2d 933.

Both jurisdictions consider a heart disorder compensable despite its having preexisted the employment in the course of which it occurred. Compare *Lumbermen's Mutual Casualty Company v. IAC* (1946) 29 C.2d 492, 496 with *Thornton v. Alaska Workmen's Compensation Board* (1966) 411

P.2d 209, 210 (citing *Associated Indemnity Corporation v. Industrial Accident Commission* (1953) C.A.2d 423).

Neither California nor Alaska requires the claimant to prove that a heart attack or other disorder results from a specific precipitating event within the scope of work activities. Compare *Lumbermen's Mutual Casualty Company v. IAC* (1946) 29 C.2d 492, 497 with *Burgess Construction Company v. Smallwood* (1981) 623 P.2d 312 (citing *Thornton*).

Finally, all factual determinations of the Alaska Workmen's Compensation Board are res judicata and conclusive upon all parties to the proceeding. *Alaska Packers Association v. Alaska Industrial Board* 12 Alaska 465; *Hazel v. Alaska Plywood Corporation* 16 Alaska 642.

That the substantive and procedural rights of a workmen's compensation claimant are, in any practical sense, identical in Alaska and California is significant, not because both jurisdictions would in the first instance have denied Rose relief, but because it demonstrates beyond dispute that respondents seek to reexamine an issue of fact—causation between work and injury—already resolved in petitioner's favor. The parties, the subject matter and the relief sought are identical in both cases. The point at issue is the same. Alaska Workmen's Compensation Board decisions are res judicata. The Full Faith and Credit Clause is therefore a complete bar to the California proceeding.

Respectfully submitted,
JOHNSTON, MILLER & GIANNINI

By JOHN H. BLAKE

(Appendices follow)

Appendix A

Workers' Compensation Appeals Board
State of California

Case No. SJ 52838

June Fred Rose,
Applicant,

vs.

Cheechako Leasing Company,

Defendant.

DECISION AFTER RECONSIDERATION

The Board previously had granted reconsideration to study the issues presented by defendant's petition for reconsideration from the decision issued by a workers' compensation judge in this case on October 3, 1980 which found:

> "The State of California, Workers' Compensation Appeals Board, has jurisdiction to hear this matter, despite a prior hearing in the State of Alaska finding injury did not arise out of and in the course of employment."

In its petition defendant argued that the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1 prohibits the present proceeding because it precludes the California Workers' Compensation Appeals Board (WCAB) from asserting "jurisdiction" over this matter. Although the issue is phrased in the terms of the Board's "jurisdiction", since applicant was hired in California it is clear that California has jurisdiction. Labor Code Section 5305. *Quong Ham Wah Co. v. IAC* 184 Cal. 26,

7 IAC 163. The issue is instead whether the Full Faith and Credit Clause of the Constitution, and 28 USC 1738[1] require us to defer to the Alaska decision despite the fact that the Alaska Workmen's Compensation Board determined the issue of compensability based on a rule that differs from the standard this Board would apply.[2]

FACTS

On August 11, 1976, applicant filed an Application for Adjudication with the WCAB's San Jose office wherein he alleged that while he was employed at Fairbanks, Alaska on March 29, 1976, he sustained an industrial injury to "heart and general injuries" from "stress and strain of job, changing frozen batteries." A hearing was held on May 3, 1977. The minutes of that hearing state that the matter would be taken off calendar since an application had been filed in Alaska. Another hearing was held on June 10, 1980. The Minutes of that hearing state the following:

> ". . . It appears from discussion that defense counsel, attorney for Cheechako Leasing Company, will be able to stipulate that had it not been for the fact that proceedings were held in Alaska in which applicant was

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[1]That Section provides in part:

> "The Acts of the legislature of any State . . . of the United States, or copies thereof, shall be authenticated by affixing the seal of such State . . . thereto.
>
> • • •
>
> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by lower usage in the courts of such State . . . from which may be taken."

[2]As will be discussed herein ,the Alaska Board held that to be compensable a heart attack "must be the result of unusual exertion". Unusual exertion is not required under California law.

denied benefits, California could have had jurisdiction and could have tried this matter under California law.

"The parties have asked that instead of proceeding with a full hearing prior to a finding on the issue of jurisdiction that they be allowed time to brief the issue of jurisdiction and that the Court make a finding on that issue before any hearing is held or decision is made on the rights of benefits of Mr. Rose should there be jurisdiction found." (Sic)

A hearing was held before the Alaska Workmen's Compensation Board on July 24, 1979. In September 1979 the Alaska Board issued a "preliminary decision" which contained the following finding of fact:

"1. The applicant did not suffer from an accident or injury while on the job. In order to be found compensible the heart attack must be the result of *unusual exertion*. Barring such evidence, the Board has held in the past that it is of natural causes and not job related. The Board specifically finds that there was no unusual exertion and therefore must deny the claim. (Emphasis added)

DECISION AND ORDER

"All claims for compensation are denied and dismissed."

A final order to that effect issued in May 1980. Apparently there was no appeal.

Trial level proceedings were then held before the WCAB on the sole issue of whether the decision in Alaska barred applicant from proceeding with his claim in California. The judge, relying on a Board panel decision, *Kerr v. Sage Communications* 7 Calif Workers' Comp Rptr 141, concluded that the claim was not so barred. Defendant then filed the petition that is now before us.

DISCUSSION

The Board agrees with the judge's decision. However in view of the recent decision in *Thomas v. Washington Gas Co.* 448 U.S. 261, 100 S.Ct. 2647 the issue warrants a more elaborate discussion than a mere citation of *Kerr.*

In *Thomas* a similar, although not identical, issue was presented, i.e. whether full faith and credit principles permit an applicant who received an award of workmen's compensation benefits in Virginia, to also receive a supplemental award under the District of Columbia's Workmen's Compensation Act, when the District of Columbia also had jurisdiction over the compensation case. The Court held that full faith and credit principles do not preclude a supplemental award.

There was no majority opinion in *Thomas* and the two separate opinions which upheld the applicant's rights to a supplemental award in *Thomas*, were based on ostensibly different rationales. The opinion of Justice Stevens was based on an interest-analysis approach. The opinion of Justice White was based on the fact that the Virginia Act did not in "unmistakable language" foreclose a supplemental award. As we will discuss below, the underlying reasoning of the two opinions is in agreement.

Justice Stevens' analysis begins by rejecting as precedents *Magnolia Petroleum Co. v. Hunt* 320 U.S. 430 (which universally barred such awards) and *Industrial Com.n. v. McCartin* 330 U.S. 622 (which barred such awards only when there is "unmistakable language" in the first states' legislation precluding supplemental awards). He then phrases the issue in terms of an interest-analysis approach,

but his analysis is interspersed with comments that suggest that he is actually using that approach to determine whether the two remedies that the applicant had in that case were mutually exclusive or whether they were cumulative. He states:

> ". . . It is thus perfectly clear that petitioner could have sought a compensation award in the first instance either in Virginia, the State in which the injury occurred, or in the District of Columbia, where petitioner resided, his employer was principally located and the employment relation was formed. . . . (C)ompensation could have been sought under either compensation scheme even if one statute or the other purported to confer an exclusive remedy on petitioner. Thus, for all practical purposes, respondent and its insurer would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes in any event. It follows that a State's interest in limiting the potential liability of businesses within the State is not of controlling importance. . . ."

After questioning the reasoning of the *Magnolia* decision, he then continues the same vein as in the previous quotation:

> ". . . A final judgment entered by a court of general jurisdiction normally establishes not only the measure of the plaintiff's rights but also the limits of the defendant's liability. A traditional application of res judicata principles enables either party to claim the benefit of the judgment insofar as it resolved issues the court had jurisdiction to decide. Although a Virginia court is free to recognize the perhaps paramount interests of another State by choosing to apply that State's law in a particular case, the Industrial Commission of Virginia does not have that power. Its jurisdiction is

limited to questions arising under the Virginia Workmen's Compensation Act. (Citation) Typically, a workmen's compensation tribunal may only apply its own State's law. In this case, the Virginia Commission could and did establish the full measure of petitioner's rights under Virginia law, but it neither could nor purported to determine his rights under the law of the District of Columbia. Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make. Since it was not requested and had no authority to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights.

• • •

"Thus, whether or not the worker has sought an award from the less generous jurisdiction in the first instance, the vindication of that State's interest in placing a ceiling on employers' liability would inevitably impinge upon the substantial interests of the second jurisdiction in the welfare and subsistence of disabled workers-interests that a court of general jurisdication might consider, but which must be ignored by the Virginia Industrial Commission. . . ."

He concludes by stating:

". . . We therefore would hold that a State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen's compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards. Accord-

ingly, *Magnolia Petroleum Co. v. Hunt* should be overruled. . ."

When these quotations are read together it becomes apparent that Justice Stevens is not applying an interest-analysis approach to determine whether the federal interest that is served by full faith and credit principles outweigh the interest a state might have in allowing a supplemental award. Instead he is weighing the state interests that would be served by finding that the remedies are mutually exclusive or alternatively, cumulative. He concluded that these interests warrant the conclusion that the remedies are cumulative.

Justice White's opinion approaches the issue differently. He rejects the interest-analysis approach and relies instead on *McCartin, Supra.* But the issue under *McCartin* is whether there is "unmistakable language" precluding the supplemental award. This is simply another way of saying that in the absence of statutory language to the contrary, the remedies are cumulative.

A review of these two opinions then establishes that even though there were separate plurality opinions, there was a consensus on the point that full faith and credit principles do not preclude a workers' compensation applicant from seeking cumulative remedies in two different states where the litigation in the second state does not involve a relitigation of a specific factual finding made in the first state.[3]

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[3]Cf. *Landry v. Carlson Mooring Service* 643 F2d 1080 (1981).

The fact that *Thomas* involved a situation where the first state issued an award and the case now before us involves a situation where the first state did not issue an award, is

not a material distinction. As we have discussed above, the *Thomas* opinions focused on the question of whether the remedies are cumulative. What the particular decision in the first state may have been, is not relevant to the question of whether the remedy is an exclusive or a cumulative one.

We have not been cited, and our own research has not discovered any Alaska authority, that indicates that workmen's compensation decision issued in that state bars other states that have jurisdiction, from providing their own workers' compensation remedies. Thus, in this case the California and Alaska remedies are cumulative.

The next question that must be answered under *Thomas,* is whether the litigation in the second state involves a relitigation of a *factual* issue (as opposed to a legal issue) that was determined in the first state. Here the *factual* issue that was determined in Alaska was whether applicant's heart attack was the result of "unusual exertion". But a finding of "unusual exertion" is not a prerequisite for recovery under California law. Therefore the California proceedings will not necessarily involve a relitigation of the specific factual issue that was decided by the Alaska Board.

Accordingly we conclude that under *Thomas,* neither the Full Faith and Credit Clause nor 28 USC Section 1738 prohibits applicant from pursuing his workers' compensation remedy in California.

For the foregoing reasons,

IT IS ORDERED that the following is the Board's Decision After Reconsideration:

CONCLUSION OF LAW

The Decision issued by the Alaska Board in applicant's case which found that his heart attack was not the result of unusual exertion, does not preclude applicant from proceeding with his claim before the California Workers' Compensation Appeals Board.

WORKERS' COMPENSATION
APPEALS BOARD
GORDON R. GAINS

I CONCUR:
D. J. HANNIGAN
Acting Deputy
MERVIN GLOW (RESIGNED)

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA, JULY 13, 1982.

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.
ELENA C. DIAZO

[SEAL]

Appendix B

Court of Appeal of the State of California
in and for the
First Appellate District
Division Two

No. AO19101
WCAB No. SJ52838

Cheechako Leasing Company,
Petitioner,
vs.
Workers' Compensation Appeals Board, et al.,
Respondents.

[Filed Feb. 28, 1983]

BY THE COURT:

The petition for writ of review is denied.

Dated Feb. 28, 1983

Rouse, J.
Acting P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

May 19, 1983

I have this day filed Order

Hearing Denied

Richardson, J.
of the opinion that the petition should be granted.

In re: 1 Civ. No. AO19101
Cheechako Leasing Co.
vs.
W.C.A.B. and Rose, June

Respectfully,

Clerk

Appendix D

Alaska Workmen's Compensation Board
Juneau, Alaska

No. 76-03-0723

June Fred Rose,
Applicant,
vs.
Cheechako Leasing Company,
Defendant.

Hearing of July 24, 1979, at Anchorage, Alaska

Present: Mr. June Fred Rose, Applicant/Witness
Mr. William Erwin, Attorney for Applicant
Mr. Alan Sherry, Attorney for Defendant
Board: Mrs. Catherine Ringstad, Member
Mr. Jim Robinson, Member
Mr. Alton Gaskill, Chairman

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Redirect Cross-Examination

Mr. Sherry

Closing Arguments:

Mr. Erwin

Mr. Sherry

Mr. Erwin

Rebuttal

Mr. Gaskill: This is a hearing before the Alaska Workmen's Compensation Board held in Anchorage, Alaska, on July 24, isn't it?, 1979. Mr. Alan Sherry represents the defendant, and Bill Erwin, Mr. Rose, the applicant. My name is Alton Gaskill, Hearing Officer. With us today are Jim Robison (welcome back, Jim) and Cathie Ringstad.

Mr. Erwin, would you like to make your opening statement?

Mr. Erwin: Yes.

Mr. Fred June Rose was employed by Cheechako Leasing Company in Fairbanks, when he suffered a heart attack on the job. The contention of the claimant in this matter is that the severe weather conditions coupled together with extraordinary working difficulties, and in particular, the stress and strain engendered by a particularly difficult job for at least a period of two months and especially immediately prior to the heart attack, precipitated a heart attack which in Mr. Rose's case, has prevented him from returning to work and, probably, has kept him from any, or may keep him from any gainful employment in the immedi-

ate near future. The evidence on that issue will consist of the testimony on the attempt on three separate occasions to retrain Mr. Rose in less strenuous occupations, all within his ability to do and the failure of his health underneath those occupations and his inability to refinish his retraining period. He has been drawing permanent total disability from Social Security and at the present time has not been, or is not, and is unable to return to any gainful type of employment because of his health difficulties from the—brought on by the heart attack which, we believe, was in the course and scope of his employment. The issues clearly would be the compensability of the matter because of the relationship of the heart attack to his employment which, we believe, can be demonstrated by the evidence, by his testimony, by his treating physician, Dr. Hirschfeld, and by, frankly, some of the material in Dr. Wilson's deposition. Although he is unfavorable he clearly uses the same process that Dr. Hirschfeld did to arrive at the conclusion which is diametrically opposed. And the depositions of Rose, Hirschfeld and a colleague, of Mark Edward Belland, who was also a worker at the same time in Fairbanks, have been taken and will be submitted in evidence on those two issues for its compensability. To our knowledge Cheechako Leasing Company is uninsured.

Mr. Sherry: The main issue which I am prepared to address today is whether or not the heart attack which Mr. Rose had in late 1976, is job related or is compensable.

On the second issue, as to his present medical condition we, frankly, just don't have enough information. I would like to request that the record be kept open on that if, and only if, the Board *finds*(!) in Mr. Rose's favor on the first

issue. Otherwise, if it is non-compensable then we won't have to go back into that, but if it is, then we would like the opportunity to ascertain more because our records really are not current as to Mr. Rose's current condition and so forth.

Mr. Gaskill: Based on that we will just decide the question of compensability at this time, but the record will be cumulative.

Mr. Sherry: All right. Thank you.

As to the issue of the heart attack, I have submitted a brief. I apologize. I guess the Board hasn't gotten it yet. The messenger service has it somewhere in town along with the original of Dr. Wilson's deposition, but the brief which cites two of the Board's earlier cases, I think establishes that in heart attack cases the rules that are to be applied, as I read them, it's the so-called "unusual exertion" test as distinguished from the usual exertion test. That is . . . [End of tape] . . . usual brings on the heart attacks because the medical evidence shows that heart attacks tend to appear statistically around the clock and the mere fortuity, or non-fortuity, if you will, that it occurs during the work day or it occurs during the night or during the sleep is not sufficient. There has to be some casual connection to some unusual circumstances, as I construe the Board's earlier decisions, and that means unusual beyond the course and scope of the person's normal history, and Dr. Wilson talks about that at some length from a medical point of view which, I think, dovetails with the legal point of view. What he was saying was that for a person who is used to a certain kind of work he does not feel that you can say that that work can cause a heart attack for the same reasons. For example, a

panel of Hearing Officers may be used to a certain kind of work. Mr. Rose is a heavy duty Diesel mechanic *with (a?)* different level of activity, does not feel you can that medically from everything he knows that a person doing that kind of work, can say that is the cause of his heart attack. Now the testimony is, of the two people who were there when Mr. Rose suffered the acute pain in his arm which was considered to be the onset of the heart attack or the myocardial infarction were Mr. Rose and Mr. Belland; and there is no dispute over certain things. There is no dispute that the heart attack occurred sometime after lunch. Mr. Belland said, I think, 1 o'clock. Mr. Rose said perhaps 2 o'clock, but it occurred after lunch. There's no dispute in the testimony that at the time Mr. Rose suffered that he was not doing anything of a strenuous nature. Mr. Belland recalls it in the vehicle. Mr. Rose recalls that he was moving around the truck, he was walking around the truck to do something but he wasn't doing anything at the time. The only difference in their recollections about what he was doing on that day was that Mr. Belland recalled they were doing some work to start some trucks. This was March 29, and they were in the break-up period and it got cold at night, below zero at night, and thawed during the day, and some trucks had to be started. This was part of Mr. Rose's job as a Diesel mechanic. The only difference was did they lift some batteries around. Mr. Rose recalls he lifted some batteries in the morning, which would have been several hours before his heart attack. Belland did not recall that. In any event, Dr. Wilson's testimony was that there was no evidence in either of those sources of any acute physical stress and strain which would cause a dramatic increase in the heart rate and so forth, which could

be of the type to cause the onset of that. Dr. Hirschfeld, in his deposition, indicates his opinion of causation. I think it is unsupported. States a general opinion: "Well, it was cold weather and he was doing heavy work." It's not accurate under the specifics of these two witnesses who were actually there. Mr. Rose was not doing heavy work that day and he was doing the work he was accustomed to. He was not doing heavy work at the time when his heart attack occurred. The weather was not cold—at least by Alaskan standards and what they were used to. It was during the thaw and they were not working outside when he incurred it. So I don't think it's—the medical opinion of Dr. Hirschfeld is unsupported and, of course, the Board in heart attack cases requires a medical opinion to substantiate these because heart attacks are different from, say, a broken arm where any of us can say "Well, I fell down and I broke my arm." A heart attack requires a medical opinion about causation. It is not in the record and it is not supported by the depositions. We don't feel that the heart attack that he did suffer is compensable.

Mr. Gaskill: Do you want to call your first witness?

Mr. Erwin: I'll call Fred June Rose.

Whereupon the applicant, Mr. June Fred Rose, was sworn by Mr. Gaskill

Mr. Gaskill: Let the record show that he has been sworn.

Mr. Erwin: You will have to speak up now, Mr. Rose.

Mr. Rose: All right.

Direct examination of the witness, Mr. June Fred Rose, by Mr. Erwin:

Q. Will you state your full name for the record, please?

A. June Fred Rose.

Q. Where do you reside, Mr. Rose?

A. In Louisiana. 6009 Lexington Avenue, Shreveport, Louisiana.

Q. How long have you resided there?

A. One year and two months.

Q. Are you married, sir?

A. Yes, sir.

Q. And do you have any children?

A. I have five children two of whom reside at home.

Q. What is your present age?

A. Fifty-seven.

Q. How old were you when you suffered the heart attack?

A. Fifty-five.

Q. Do you remember the date on which you suffered the heart attack?

A. March the twenty-ninth, 1976.

Q. Where were you working when you became ill?

A. I was working at Sourdough Freight shop for Cheechako Leasing.

Q. How did you happen to get that job?

A. I acquired that job through a friend. I was planning on working in Alaska. I'd been asking around and a friend that I'd worked with, International Harvester.

Q. Where was this at?

A. This was San Jose, California.

This mechanic was to take the job, and told me that his son became ill and he wasn't going to take it, and if I was still interested in a job in Alaska why I could contact Mr. Huff, which I did.

Q. Did you subsequently take the job?

A. Sir?

Q. Did you subsequently take the job?

A. Yes, I did.

Q. What were the terms of employment?

A. The terms of employment was the first thirty days would be for four thousand a month—a trial situation—work or not—and the next month and so on would be at the rate of five thousand a month, ten hours a day, seven days a week, full insurance coverage, one week off every three months without pay, and my tools would be transported by the company on the job. I believe that was about the size of it.

Q. Was there any discussion of insurance at that time?

A. Definitely.

Q. What was that discussion?

A. That for myself I would have full coverage on accidents, hospitalization and doctor or medical. My wife and family would not have any, and I was even given two examples of employees of Mr. Huff, Cheechako Leasing or elsewhere I don't know. But the insurance was good, basically, and I take it *you know that(?)*.

Q. What type of education do you have, Mr. Rose?

A. High School. I completed twelve years. In *Dodge(?)* City, Missouri.

Q. Were you in the Service?

A. Three years. Navy, and I have an Honorable Discharge.

Q. What was your job in the Service, please?

A. Coxswain. I operated small craft. I operated cranes, landing barges, GMC Diesels, *power(?)*.

Q. After you got out of the Service did you do any of that type of work again?

A. First, I schooled, and came to the city school as a watchmaker. And I worked for Wilson Packing Company as Night Guard. Finished and completed the school. I couldn't find a job that—The apprenticeship program was so—In the base scale of pay at that time I had two children. I went back to work as a mechanic.

Q. Have you followed any other trade since that time?

A. Just about one year, I drove a truck. National Gas, but it was still in trucks, truck mechanics. And I supervised for about three years.

Q. In the work you've done during the period of time after the Second World War, generally what type of work have you done?

A. Diesel heavy duty trucks.

Q. When did you go to Fairbanks?

A. January the fifteenth. I worked one week in San Jose, for Mr. Huff, on trucks returning from the job in Fairbanks. They were leased from Hertz Truck Rental in San Jose, California. I got those six where the Hertz Company would accept them, wrote up a report on the shape and condition of each truck before it was turned in.

Q. When you went to Fairbanks what was your job? What duties did you have?

A. I went up as a Diesel mechanic, an engine man. I agreed to help on the general mechanics and to help out the others. I mainly went up as a Diesel mechanic.

Q. Had you ever worked in Alaska prior to that time?

A. I spent fourteen months with the Navy. Point Barrow. I was up there probably three months, Dutch Harbor, for about six, and the other six I was in the Aleutian Chain.

Q. Between the time that you were in Alaska during World War II and the time you went to Fairbanks in 1975, had you ever been back?

A. Just flown over is all, in an airplane. Never , no.

Q. In what type of climate was the majority of your work done prior to that time?

A. Most of it was general four-season type of climate, Missouri, Colorado, Utah and Central California.

Q. What kind of working conditions did you have in Fairbanks, once you got there, Mr. Rose?

A. The buildings were very old. We had absolutely no equipment. We had a small building on the east side of the house that we lived in. The first week there we managed two trucks to get in it. We tied up that shop and then there was a large quonset that would possibly hold 25 or 30 large trucks, a large quonset. It was all iced in. There was no ventilation. Had an extremely large space heater for heat. We worked out of that quite steady for about two weeks, and the third week the old Weaver Building where the house set was empty. Weavers moved into their new shop and the other two buildings that were on that lot—one was a large one that had a gas furnace in it; one had a coal furnace. Weavers removed the gas furnace from the big

building. The smaller building, the coal furnace was put in. *Ventilation* in the property broke down the second day we were there. I worked half of one night fixing that, attempting to fix it. The bearings and shaft were worn out. Froze up again. We worked on it as assistant for about a week trying to keep the building from freezing up. The shaft finally fractured and broke. We had no welder at the place yet. We hadn't brought the shift up. We hired a furnace man and he came out, welded it. Two hours later it caught on fire and we had the Fire Department out. I think the furnace probably worked two weeks at the most of the two months we were in there. We used space heaters.

Q. How many people were working there?

A. There was six at the most. Started out with five but he did hire another mechanic.

Q. How many trucks did you have to care for?

A. Cheechako Leasing had sixteen trucks. Mr. Huff owned one on his own, which made seventeen, Mr. Huff and Carl Baltrusch bought one, which made about eighteen, and I think Carl Baltrusch had about 25 or 30 that was leased to Sourdough. I was under orders that if Carl Baltrusch wanted us to inspect, work on or help him out in any way on his rigs were were ordered so to work on his trucks also.

Q. Somewhere around 50 or 60 trucks, then?

A. I'd say 50, possibly. That we were involved in.

Q. You had a regular shift to work?

A. He said we were to work ten hours a day, from 8 o'clock in the morning until 7 in the evening, and keep the shop open seven days a week.

Q. Were you able to accomplish that in ten hours a day?

A. No way. No. Not possible. We worked over, many and many a time.

Q. In general, were you called out in the evening much, Mr. Rose?

A. Certainly. We had many calls to Sourdough. Many of theme were small. I had about three or four long hauls, 28 Mile and one at Livengood, I believe, and one was on the Alyeska Base up on the Yukon River. Most of our night work was that last, the third month, when all trucks went to work. We had only the one shift and these trucks would cycle. And when they would bring them back in there would possibly two or three every night or every other night, and we'd usually fix them up between 8 and midnight. And the truckers—seemed like their schedule was to go out about midnight of the night and that would give us opportunity to make minor repairs and service each truck. Some were full service; some were partial service. And it got more than we could handle.

Q. During the period of time, January, February, March, what was the weather like in Fairbanks?

A. It was cold. We had had anywhere from 50 below with the wind factor sometimes 90; and at break-up it warms up. We had as high as 30 the last week. It was 30 above.

Q. Was that work, mechanic work, in the conditions you were used to?

A. No. I'd say it was—First I figured it was a challenge. The first month the trucks weren't working. Equipment never arrived or a promise was never held through. There was a great lack of communication between the employers and the employees, and who had resposible and who didn't,

and it was based on a big, happy family situation that *played(?)* out.

Q. What were your living conditions? Where were you supposed to live?

A. We had a house on the old Weaver property. There was five of us and then he hired the second mechanic which made six, lived upstairs, and there was five or six truck drivers or people seeking work as truck drivers that lived in the basement. Temporary quarters. They had a hot plate. They had one telephone and there were two or three extensions to that telephone—one to the little two-room building which was rented out to some welders; one to the shop on the west side of the building; one in the basement for the truck drivers, and we had to bring the phone in our kitchen upstairs. The phone rang all the time. The meals was a lot of hassle.

Q. Who cooked the meals?

A. We took turns. We all took turns. We did the work on a share basis. One would do it one night on whatever night he could break loose from his work. We shared the housekeeping, the washing and the cooking.

Q. This description, did it hold true for most of the time you were working there?

A. No. The first month, yes. The second month was a little worse. The third month was down to everybody catch as catch can. We ate sandwiches. We ate on the run. We ate out. Well, there was nobody there who could maintain those schedules. There wasn't enough employees to maintain a schedule.

Q. Were you working longer hours in that third month?

A. Sometimes eighteen, twenty hours. A day. Their schedule was in terrible condition. We were approached by Carl *Bartrese(?)* and they even cleaned out two *days(?)* of Sourdough work to work in their shop. We refused to go out there without a union card for we were union *men(?)*. There were heavy threats, insults to mechanics of Sourdough Freight. Carl said it wouldn't be any problem, but no way would we go out without a union card. Mr. Huff's is absolutely no union, and we talked to Bob Little (I believe he's Carl's lawyer) which I think was a partner in the shop for a little while, and he said he would discuss it, and he came back to us later and we said we wouldn't go in Sourdough Freight Shop. They did have a fine shop down there.

Q. Turning your attention to the couple of days immediately following—preceding the illness that overcame you, what—do you know what two days they were? Were they—

A. Saturday and Sunday.

Q. How long did you put in on those two days?

A. Regular time. But the week before that we put in some heavy hours. I'd say we put in hours, 20 hours a day, two or three hours, maybe, of sleep uninterrupted, and the Thursday before that I think we put in eighteen or twenty hours, and on that Friday we only worked, I believe, six hours, and we got a chance and we knocked off a little early Friday. Saturday and Sunday, we put in, I think, just ten hours.

Q. Did the weather improve on Sunday at all?

A. Yes, it warmed up. It got up—I believe it was 30 above. Fahrenheit.

Q. What did you do on Monday?

A. I believe we were called out an hour early. We usually went into the shop at 8. The Dispatcher from Sourdough called at the house and said that the Dispatcher before him had had the boys that worked the lot go out and shut down all the Diesel rigs, it was warm enough and there was no sense wasting fuel letting the engine *drop(?)*. During that night it dropped to 5° below zero and there wasn't a truck on the place that would start. So the temperature dropped in that one night.

Q. What is the significance that the trucks wouldn't start that morning?

A. Well, there was mechanics, the drivers from all the rigs, some of them was straight time, some was time and a half, some double time men. Everybody was in the state of confusion fighting over who was going to get what battery charger that was available and what space heater to heat the engines and the batteries, just a bundle of confused men trying to get a bunch of trucks ready.

Q. What was your feelings about it?

A. I'd say highly disgusted or—It was irritating in the fact that they'd shut the trucks off and the temperatures as cold as it got, and there was no way that the electrical system or battery conditions or big engines that run up into that Prudhoe Bay and back, that were under heavy-loaded conditions there's no way you can start them engines. When it's 10 below zero or 10 above zero, there's no way you can start them.

Q. What did you have to do to get them started, Mr. Rose?

A. Two of them we had to change the batteries. They were really froze. There was ice in them They absolutely

wouldn't take a charge. And we had to take those batteries out, go back to the shop and get new batteries. We done that each time. We took one truck at a time until we fired it off. It was the only way we could work with everybody fighting over cables, space heaters. And we'd take one truck at a time until we could get it started and started up. There was two of them we had to change *dual(?)* batteries each, in each truck.

Q. How did you get the batteries there?

A. We had a little Ford four-seater. We took them from the old Weaver shop, we had a little store in there that we kept. We kept some batteries on chargers.

Q. What do they weigh?

A. Forty, fifty pounds apiece.

Q. Who loaded them?

A. I and Mark. We both loaded them. We loaded, I guess, eight, all told. Four going out and eight coming in. Handled them four times each.

Q. Did you install those that morning?

A. Yes.

Q. Was that amount of work in the installation of those batteries usual?

A. It's extremely irritating. The cold, we couldn't get battery chargers, we had trouble finding an electrolight. They were dry packs, and we have to get the electrolights from Sourdough and we had to fight with the foreman, Mr. Arden, out there to give us boxes of electrolights to pour into the batteries, and after we got it in it was still cold to the place where the batteries wouldn't charge quick enough and we had to find battery chargers, put on the batteries and get a space heater, move it up alongside of them to

heat the batteries and the engine, and then we'd *usually(?)* one would get in the truck and fit the electrical starter, and the other was standing up on the back of the truck with an ether can and pump ether into the air intake on them, and we'd finally accomplish it. Maybe an hour or two hours on a unit trying to start one of them. And you've got drivers and supervisors and everybody else standing around there. Everybody's wanting everything at the same time.

Q. When did you first begin to feel ill during this period of time?

A. Before the heart attack?

Q. Yes.

A. Actually, I was in shock. And then I got sick. I got real nauseated. I was getting ready trying to start one of those trucks. And I went out and I vomited. And Mark was out working on another truck the first time I vomited. And he came back and wanted to know what the heck was the matter and I told him that I was sick.

Q. Had you felt anything prior to that?

A. Well, yes. Not in my stomach nor my chest, but I thought I'd pulled a muscle in my shoulder.

Q. When was that?

A. Well, we'd had lunch and we was on our way back to Sourdough. I never even thought about it being *that(?)*.

Q. What did you feel at that time?

A. I'd say like a pulled muscle. It felt like the top part of my shoulder and my neck here. My left shoulder. All I can remember was it began to feel like a pulled muscle from loading the batteries there. I didn't feel faint or light-headed or nauseated. Not until I got into the shop and was getting ready to start that truck. I'd already put the bat-

teries in it before we went to lunch. And that's the only reason we went to lunch. We even put a battery charger on it, put a space heater by it to warm it up, and we went to lunch.

Q. Tell us, generally, did you stay at work any further after you vomited?

A. No, I didn't. I felt light-headed and I could hardly stand up. And I told Mark. I said "Man, I've got to go in." I though I had food poison. That's the way I felt. I'd never had indigestion. I'd never been sick. Never had any heart problems. Anyway, we went back to the old Weaver shop. Mr. Huff and some other mechanics was in there and they was kind of kidding me, wanting to know if I was playing possum or something, wanting to get out of working. They made a joke of it. And I got sick and I vomited again, and I said "Man, I'm going to the house. I've had it for today. I'm sick." Mr. Huff helped me get into the house, and he even called his doctor and discussed with me. I couldn't tell him nothing but that I was sick at the stomach, nauseated. And I vomited at the house once and that's when they —. I told the hospital there was something wrong. I was getting very light-headed, couldn't see good and that's probably—an hour and a half later.

Q. Now, Mr. Rose you've been off of work approximately what? two years now?

A. Yes. Over that.

Q. Over that?

A. Yes, sir, over that. Three years. Three years.

Q. After you were generally released from the hospital did you attempt to return to work?

A. I didn't attempt until Dr. Hirschfeld asked me—I was having a little, little mental problems wanting to go to work. I felt like I needed to do something. He told me if I wanted to check with Rehabilitation it was all right as long as I got into something that was not heavy strenuous work. So I went down to a man by the name of Ed *Goldish(?)*, in San Jose, Rehab., and he gave me a list of different kinds of rehab. *Well I had(?)* welded, and there's a lot of welding that's not *restraining(?)*, and I asked him about certifying me and he said "Yeah, they had a place on *Holden(?)* Street. Had never welded to the place I was a certified welder, and they said that I could get certifications, irons, steel, stainless, pipe and what-have-you if I'd like to try. So I went down and I talked with them and I discussed with Rehab and they put me on half work, four hours of a morning. They'd instruct me on a half-time training period. I liked the work and enjoyed doing it and I was clear up to where I was a CA SA testing standards. There was times I'd go out and I'd have to set. I'd have slight angina pains, nothing heavy. For about the first four or five months and then it kept increasing and I kept getting tireder and I kept trying and finally I wound up in the hospital getting checked out one day. Pain, and they thought it was intestinal 'flu or a little muscle spasms or *pulling(?)*. They didn't think it was my heart and I was discharged from there, and so I didn't—it stopped me from having that.

Q. Did you try again?

A. Not in the welding. And then my finances was getting extremely tight and I have a daughter and a son-in-law and a granddaughter in Shreveport and maybe a little bit of real estate and my finances was getting—they were

extremely high in San Jose. I sold my home. Went to Shreveport. Got an OK from Rehab in San Jose and I checked in at Shreveport to a Mr. Leach at Shreveport Rehab. And there he said I'd have to get a doctor's clearance so I went to a doctor in Shreveport, and I had tests, and he said he wanted to wait a few months before I tried rehab. He gave me the OK to go ahead and try as long as I didn't go into anything heavy physically. And I went out to the rehabilitation school of Louisiana and I got into commercial refrigeration. In other words, they discussed it and felt that that would be about the lightest thing they could get me into. And I started having a little problems and I discussed it with the doctor and Rehab they told me that they wouldn't consent me going into commercial refrigeration on account of hot-cold temperatures and advised me to quit. So I went back to vocational school. I talked to the Diesel instructor and they had a large fuel pump and blower and injecter ....., and I asked if there was any possible way I could get into specializing Diesel fuel pumps and injecter ..... and blowers, and they OK'd that, and the State of Louisiana OK'd it, and I started that. And about three bumps was about all I could hack and I tried it full time. And I got to do *Jonaplanes(?)*, silver planes, and was in bed for about five days, and I haven't tried it since. Still under doctor's care.

Q. You have not worked since the heart attack in Fairbanks, then?

A. No.

Q. Or made any mon—

A. Any money, no.

Q. Are you released to do any kind of light work if you could find it?

A. Not as of now, no.

Q. How are you living?

A. I'm surviving, barely, living on Social Security disability only.

Q. Have you qualified for that?

A. I've qualified for that, yes.

Q. On what basis did you qualify for Social Security disability?

A. Total disability.

Q. Did you go through a hearing for that?

A. Yes. *Bicardo Law Firm(?)* in San Jose actually cleared that for me.

Q. Mr. Rose, what was your earnings immediately preceding the heart attack?

A. Approximately twenty-two thousand.

Q. What about the year before that?

A. I'd say—

Mr. Sherry: '75 you are talking about? '75?

Mr. Erwin: Yes.

A. Brooks & Taylor Caterpillar Agency in San Jose. About the same.

Q. And 1974?

A. Eighteen.

Q. What about an approximation in 1973?

A. I'd say approximately the same.

Q. Eighteen?

A. Eighteen thousand.

Q. Your high year would have been the year immediately preceding the heart attack?

A. Yes.

Q. Mr. Rose, did you ever work under the conditions you found at Fairbanks before?

A. No, sir. I understood when I took the job that it was a new company. The only man that knew anything about trucks was the man, I'd say, was the man that Mr. Huff and his partner bought the trucks from. Carl Baltrusch, General Manager for Sourdough Freight Lines. I'd say that man knows trucks.

Q. What about the other mechanics on the job?

A. Had a helper that was an aircraft mechanic, by the name of—

Q. It doesn't really make any difference.

A. All right. He was an aircraft mechanic and a welder, aluminum welder. He wasn't a rough, heavy steel welder. The other man was a truck driver. Had worked for Hertz Truck Rental in San Jose. I don't know what he'd done. He knew nothing about Diesels. He may knew of other parts of a truck. *Scant(?)* his work. He worked as lubrication man and he picked up delivery trucks. Mark Belland, he run the house, bought the groceries, done all the expediting and took care of all the jobbing out of Sourdough Freight, parts, and between him and one of the partners that was up here, handled petty cash, and they were ....., I understand, on the petty cash deal. He was the most in authority when Mr. Huff was not there.

Q. Who did most of the mechanic's work, then?

A. I did, I'd say—The engine work, I'd have them help me. Some of the other, the welding work on the frames and stuff they could handle on their own. They hired a man, finally, when the workload got so heavy for us that we were just absolutely unable to handle it, but they only left

him with us for two weeks and they sent him on a new job. They set up a new company here in Anchorage, Parcel Delivery, and they sent him down here. He was here and we were there and we had four trucks sent from Fairbanks to Anchorage and we had four, I believe, sent to Valdez, and we did help each other back and forth if we had a breakdown on the road. [End of tape]

Cross examination of the witness, Mr. June Fred Rose, by Mr. Sherry:

Q. Mr. Rose, if I understand your testimony, at the time you felt this wave of nausea and you threw up which to you signified you were sick, you were not actually doing anything physically strenuous, were you?

A. I was attempting to start a truck that had froze up.

Q. You were walking around the truck at the time?

A. I was attempting to get in the cab. I was attempting to get in the cab.

Q. You hadn't lifted the batteries except in the morning. Is that right?

A. In the morning, before we ate, yes, sir.

Q. And this event when you had the nausea and you thought you were ill, which was probably the heart attack coming on, that was in the afternoon, right?

A. Yes, sir, after lunch.

Q. And I think you testified in your deposition that was about 2 o'clock?

A. I's estimating that.

Q. So it could be as much as three hours from the time you were lifting the batteries?

A. No. No. We didn't take lunch until—We were late. I'd say it was possibly an hour. We were being pushed

for time, we came in and we had a quick sandwich, and there was some cottage cheese and pineapple salad in the refrigerator. We ate that and split right back to the truck. We weren't gone over an hour at the most, I'd say.

Q. But you didn't have any of that nausea or vomiting or anything when you were lifting the batteries, were you?

A. No.

Q. Apparently nothing bothered you at that time that *prompted(?)* a heart attack in the morning?

A. Just irritation. All the confusion.

Q. You didn't understand my question. There was nothing that told you when you were lifting these batteries in the morning before lunch that you had a heart attack?

A. Physically, no.

Q. That day, if I understand, you came to work about 9 o'clock? In the morning that day?

A. Seven o'clock.

Q. In your deposition you said "nine". You take a look at that and maybe there's some confusion in the recor—

A. I'm quite sure we were called out early. The day—

Q. Let me just have you take a look at that and tell me if that's— At least what you said in your deposition, page 39.

Mr. Sherry: Do you have that in front of you, Bill?

Mr. Erwin: What line?

Q. Mr. Rose, down toward the bottom there, do you see that? [Pause] Did you say in your deposition when you were asked what time you reported that day, you said "Possibly 9 o'clock"?

A. I don't know. If it it says so I imagine that's an error.

Q. Would your memory at the time you gave the deposition about that be more accurate than it is today?

A. I don't know. Not to my knowledge it isn't.

Q. That night, the night before your heart attack, you got a full night's sleep, didn't you?

A. Yes, I'm sure.

Q. And, in fact, for several nights before that you had a full night's sleep, hadn't you?

A. Yes, I'm sure I got—Let's see! We went out to dinner, I think, on that Friday night, and I'd say I got more than normal amount of sleep.

Q. You got as much as you needed, in other words?

A. Well, I got more than I had been getting.

Q. If you felt the need you could have gone to bed earlier. Right? That Friday night, for example?

A. Yes.

Q. Saturday night?

A. Friday night, I believe.

Q. But you could have, if you wanted more sleep, had it Friday, Saturday or Sunday night? If you felt the need? Because you were working irregular hours.

A. I suppose.

Q. So is it a fair statement that for those three nights, at least, you got all the sleep your body *should(?)* need?

A. I think so.

Q. And the temperatures, as I undestand the break-up as occurring and the days were warming up?

A. Yes.

Q. So it was cold at night, below zero, but during the day it got up thawing and the roads were getting muddy?

A. Yes, sir, it was warming.

Q. The day of the heart attack, say in the afternoon, the temperature outside would be close to 30 or so?

A. I don't know. Now that I definitely can't tell you how much it warmed up.

Q. You were dressed for it through, weren't you?

A. Yes, sir.

Q. You weren't cold, I take it?

A. [No answer heard]

Q. I think you indicated that the work you and the others were doing that day was trying to get the trucks started that day, that had been shut down the night before. Right?

A. Right.

Q. And I think, if I understood your testimony, it took perhaps an hour or so for a truck, to get it started, to go through all the process to get it cranked up to where it would run. Is that what you said earlier, I think, that early?

A. Yes, and hour or longer.

Q. Somewhere in that range. So the battery work—I think you mentioned that you'd done some lifting of batteries in a couple of trucks. That would have been spread out over a couple of hours?

A. Well, yes. We had Sourdough mechanics, we had our mechanics, and there was two or three other fleet men out there. I mean, it was kind of catch as catch can on getting jumper cables and equipment.

Q. OK, maybe—

A. It was whoever was there first on the spot that started their truck.

Q. Maybe my question wasn't clear, but would it be fair statement that the battery lifting you testified to was spread out that morning over a couple of hours? It wasn't occurring all at the same time.

A. Each truck as we'd go to start it, we'd take four dead batteries out, put them in the truck, go back to—I think the first truck Mark took them back to the shop.

Q. He'd bring back—

A. He brought back fresh batteries. He would go out and check another truck. I took these fresh batteries out, the ones brought, turn them over and put them in a truck and start working on starting the truck.

Q. So you spent an hour to an hour and a half per truck doing that process?

A. Yes. At a minimum.

Q. So what I was saying was that the lifting of the batteries would be spread out over a couple of hours?

A. Yes.

Mr. Gaskill: Do you have much more? Are you going to cross-examine him much more?

Mr. Sherry: A little bit more. Am I running out of time?

Mr. Gaskill: Huh?

Mr. Sherry: Am I running out of time?

Mr. Gaskill: No. I just wanted to take a break.

Mr. Sherry: Oh, OK. I—it will take maybe fifteen minutes so if you want to take a break, whatever.

Mr. Gaskill: Let's take a short break.

(Off the record)

Mr. Gaskill: We're back on the record.

Q. Mr. Rose, I ..... not quite clear. I think it is true, isn't it that for about three days before your heart attack you were basically working shop hours as opposed to the *steaming(?)* hours that you testified to earlier?

A. Yes, sir, I believe so.

Q. And that was basically from 8 to about 7 with an hour for lunch?

A. Yes.

Q. Now in your previous twenty-odd years in Diesel mechanic work that you had before you came to Alaska, you had done physical work during those times hadn't you?

A. Yes.

Q. That is, it seems to be physical labor, isn't it?

A. Yes, sir. An engine mechanic.

Q. You have to lift things on occasion and return things. You were not a non-working foreman type?

A. No. I was a working type.

Q. You've been active all your life?

A. Yes, sir. Out at base job.

Q. What is the name of your doctor now in Shreveport? Is he a specialist or a general practitioner?

A. I've got a general practitioner.

Mr. Erwin: .....

Q. We won't take the Board's time but will you give that to your attorney just so we can be sure we have all the current names?

A. Yes. I have a general practitioner right now. Trying to save a buck.

Q. As far as you know, is there any plan for any surgery or any sort of medical treatment for your heart condition?

A. They said possibly not within five years. That was Dr. *Fewtrell(?)*, in Shreveport, that told me that, a cardiologist.

Q. He said not within five years?

A. He couldn't foresee it.

Q. We, of course, can get the doctor's records, but what he was saying was that you didn't need any heart surgery for five years?

A. That he could foresee. He sent me to the Veterans Hospital in Arkansas. I was tested out there.

Q. If we could, rather than just asking you what they may have said because there are specialized things that may have—if you will supply all that material, the Veterans and the different doctors to your attorney and he can supply it to us.

A. All right.

Mr. Sherry: I have no further questions. Thank you, sir.

Redirect examination of the witness, Mr. June Fred Rose, by Mr. Erwin:

Q. Mr. Rose.—

A. Yes?

Q. Were the things that you did in Fairbanks similar to the previous jobs that you did in mechanic work?

A. The type of things was the same. I *prefer(?)* a Cummings' engine. Mainly all their work was Cummings. Sourdough had some V-12 DMC Diesels I'm familiar with.

The difference was the intelligence of Mr. Huff, Mark—I never can remember his last name.

Q. Belland?

A. Belland. The men I worked with were not truck people, and the communication was rough. It was hard to visualize how to communicate and do where there's a slang in any type of trade, and their knowledge of it—it wasn't there. I could go to Sourdough and I can make out fine with their truck line going and everything, but I was non-union and they were union, and there was a big prejudice, there was a lot of conflict usually. And there was no equipment in the place.

Q. In terms of doing the work, would you compare that as to the difficulty or ease to what you had previously been used to?

A. The difficulty was tremendous. We didn't have the space or the knowledge. To perform the mechancial *pad(?)*. These things take a lot of technical instrumentation to get the maximum amount of horsepower out of them, one of those engines; and it wasn't normal. I was disheartened to work on those big engines with nothing to work with. They promised us we'd get it and we never did get it.

Q. Did that extend your hours considerably?

A. Tremendous. We'd work, sometimes three times as long on something than if we'd had the proper equipment or the proper machines or tools to do it with.

Q. This is not then a typical job that you'd worked on previously?

A. No, sir. And I was given promises that it would be.

Mr. Erwin: That's all the questions I have.

Mr. Sherry: I have just about one more.

Redirect Cross-examination of the Witness, Mr. June Fred Rose, by Mr. Sherry:

Q. Mr. Rose, when were hired here in Alaska at four thousand a month, I think you testified, which I assume was a substantial increase over what you previously earned, you were told that it was going to be—the hours would be longer than you worked on the other jobs?

A. Yes. It was definitely in the agreement. I said I agreed to ten hours a day, seven days a week. If I'd worked in San Francisco that hours I'd made more than I did up here.

[End of tape]

[Notary's Note: This tape is not quite the length it should be. The usual tape takes approximately thirty pages of transcript: this made but 9]

Mr. Gaskill: The Board any questions? [Pause] Next witness?

Mr. Erwin: The next witnesses will all be presented by deposition at that point. That will be the depositions of Dr. Belland, Dr. Hirschfeld, and I assume you won't object if I put in Dr. Rodman Wilson's deposition. That includes, also, the deposition of Fred June Rose and that would close the case.

Mr. Gaskill: Do you have all of them?

Mr. Sherry: Yes.

Mr. Erwin: They are all here if you wish them.

Mr. Gaskill: We'll check them all out after the hearing.

Mr. Erwin: All right.

We would also move to—No, that's not necessary. I was going to move to put the medical records in, but I don't think that's necessary with the depositions.

Mr. Gaskill: Is there any objection to admitting the medical records, to using them as evidence?

Mr. Sherry: None.

Mr. Erwin: None here, either.

Mr. Gaskill: Would you like to make closing argument?

Mr. Erwin: Yes.

This is one of a series in the long history of heart attack cases in front of the Workmen's Compensation Board. And it usually boils down to the same problem in the application of the law and in the facts, whether or not there was any indication in the medical evidence or in the physical evidence if the job contributed to, aggravated or triggered the heart attack which resulted in the disablement of one of the parties. The evidence usually takes the same tack as it has taken here. Claimant almost always emphasizes the very difficult jobs that he had to do, difficult conditions under which he was working, the immediate area in which he was struggling to complete his task, with an onset, generally of arm pain, jaw pain, shoulder pain, some type of pain, nausea, lightheadedness and immediate confirmation at a local hospital that he's had a myocardial infarction, coronary occlusion or ischemic difficulties in the heart.

The defendant almost always says he wasn't doing anything at the time it advanced, that he at the moment of attack was at rest, that he was not suffering any particular difficulties that he had, that he was at all times being very normal in his approach in those things and that in the immediate preceding arrangement suffered no unusual exertion or difficulties.

And they vary, only in terms of length of time from the last exertion, from one hour to several days. They vary in terms of when the heart attack can and does occur, like the exertion taken care of in the morning and the heart attack at 2 o'clock [sic] in the evening, or longer than that.

Inevitably, the testimony boils down to one doctor who says he believes the conditions under which he was working and the described arrangements were sufficient enough to cause and did trigger a heart attack. Dr. Hirschfeld, the treating physician in this man's case, says there isn't any doubt in his mind about it and he so testified. Dr. Rodman Wilson, who was not the treating physician but an expert who has testified here numbers of times heretofore, and in generally he usually testifies that heart attacks occur at random, that there is nothing that triggers them, that they usually are the result of atherosclerosis and that they can occur at any time and that general exercise, stress, strain, never triggers those off. And he so testifies in his *manner(?)*, which leaves it squarely to the Board to evaluate and sift the evidence based on what they believe the truth to be somewhere as to what legal cause is and to what medical cause is because there is no concensus of opinion under any circumstances as to what should trigger legal cause, and it remains, in spite of the cases in our Supreme Court, it still remains a function of the Board to make that decision based on the evidence in front of it, and we try to produce the best evidence that you can make that decision on.

The two doctors in this case are not that far apart in their procedure and if you read it closely and the cross-examination that's involved, it is entirely clear that they use exactly the same method to arrive at the conclusions

which they expressed today, diametrically opposed. Dr. Hirschfeld reviews all the same things that you are generally going to review, and he comes to the conclusion that underneath his opinion this is sufficient to rise and can and he was willing to make his medical opinion that the heart attack probably was triggered or caused by the conditions under which Mr. Rose was, in fact, working. Dr. Rodman Wilson very closely says he reviews exactly the same material, the same records, the same material, and says medical science can not specifically say and arrive at this conclusion. Further on he says "Underneath the circumstances in this particular matter would the conditions describe cause or trigger anything" at least in his opinion, and, in fact, he almost always comes to the conclusion that there isn't, except in certain cases, as he testified to, and he specifically stated at least one case in which he has testified that it did trigger a heart attack, a man who in Valdez dropped a crane and nearly killed three people in a very unsafe situation, was extremely angry, bawled those people out, he removed himself from the job, drove all the way home from Wasilla, had a big meal, and at 2 o'clock in the morning, some fourteen hours later, had a heart attack. That's exactly the conclusion that Dr. Wilson says he came to that made one compensable and so testified. Now, underneath those facts, he was absolutely convinced that the man had an aggravation, intense anger, hard work and an incident which could, indeed, with pre-existing atherosclerosis trigger a heart attack. And he's said this on ten or twelve other occasions in which he's made the same conclusion. Dr. Hirschfeld, the same type of doctor, internal medicine, arrived at the same conclusion, based on those same factors and the same type of conclusionary arrangement, and said

it did, in Mr. Rose's case. Dr. Wilson, without having the same type of arrangement, without ever looking at Mr. Rose, by looking at the medical records, comes to the conclusion that it did not. You may review those things, take into consideration which doctor had the best opportunity to observe, how soon and when, and conclude, perhaps, that Dr. Wilson generally testifies and says specifically that he has—I'll call it "bias". Maybe you will be easier on that matter—simply says that heart attacks occur at random. He rarely testifies except in cases where he can pin it down by the facts and the man he sees himself would be there. I would ask you carefully to look at that. We also have attached to his deposition the conclusions of the Committee on Stress, Strain and Heart Disease, dedicated to by Dr. Dudley White, at least of the American Heart Association, which says clearly that certain stresses and strains on a one-time basis can and may result in the triggering of certain heart attacks. Dr. Wilson simply says this is an unwarranted conclusion based on information that is simply speculative and that underneath the circumstances he doesn't believe it. He believes that's a minority opinion. And he's entitled to his opinion, but it forms a portion of evidence in the case and the conclusions in this case which I think are probably unwarranted. You may waive that as you obviously do and often do in the decision as to whether or not in this particular case the conditions under which Mr. Rose was working, which are, and were, I believe, extreme and which he has attempted to portray for you, were different from any stress that he has had, and not only that but in the physical labor that he has had, especially during and immediately preceding in the three hours before.

I don't think there's any major significance to the fact that it was—he flipped those batteries over a two-hour period. I don't think there is any major significance that he wasn't carrying a 50-pound battery when he had his heart attack, because the exertion that he was doing that morning, as he has described to you, was aggravating, it was under pressure, he was busy trying to start those things, he was working hard, he wasn't taking any particular time, and it wasn't the usual type of thing that he normally did every morning. It was a pressure job for two or three months, but he certainly hadn't done any of that type of work for the twenty years prior to that, and he so testified.

I think the evidence is reasonably clear that underneath the circumstances that it probably was and did trigger this, and I think Dr. Hirschfeld's opinion is probably superior to Dr. Rodman Wilson's opinion when it is closely compared to the types and the observations Dr. Hirschfeld is able to make.

That's essentially the case, and there isn't really much more to say about it in the description of what needs to be done, how it needs to be decided.

Mr. Sherry: It does come down to a matter of medical opinion and I think the Brief that was submitted indicates the previous Board's determinations, and I think the appropriate rule of law, the so-called "unusual exertion test"—and I think that's based on two things why that's an appropriate rule to follow. (1) I think it is appropriate as a matter of policy that in heart attack cases where the Board has earlier said that it's a matter of causation over a long period of time, and so forth, that there has to be,

both as a matter of policy and also as a matter of proof, I think, something unusual, an unusual circumstance or an unusual exertion as opposed to the situation where someone is just doing the routine things constantly and has a heart attack according to what both doctors say statistically can occur around the clock, could occur while sitting here at the desk or could occur at home, they really should not be compensable unless there is something unusual than can be directly attributed to the job. Now, we have Dr. Hirschfeld, while, of course, he did see the patient there is nothing gained from that in terms of the history that isn't accurately portrayed in the depositions and so forth and the medical history. Such as an opinion for causation for something that occurred some time previously both doctors are capable of rendering such an opinion. Dr. Hirschfeld said that it's possible that had he not performed such physically taxing duties over long periods of time he would not have suffered the myocardial infarction. That was his report which I believe is in the medical material. Dr. Hirschfeld's opinion was that there was causation and indicated that because there was adverse weather conditions and strenuous work—Now the adverse weather conditions I don't believe are there. I think Dr. Hirschfeld perhaps never having been to Alaska assumed that. Dr. Wilson, of course, and I think all of us know in Alaska that people dress for the weather. Mr. Rose indicated that. The weather was warming up. No-one was cold. They had the appropriate clothing. They were working inside. You'll see in the deposition of Mr. Belland not contradicted by Mr. Rose, it was a warm day, they had adequate clothing, no-one was cold. So one of the two things Dr. Hirschfeld's rather cryptic opinion is based on is the theory that some-

how there was a working under adverse weather conditions. As Dr. Wilson said, if you were standing on the corner of Cushman and—I don't know Fairbanks but a cross street with Cushman,—in your undies or something, in January, you might be so cold that that would have some effect on your heart. It would constrict the blood vessels and so forth. That is not the case here. Men who have worked all their life doing heavy mechanical type work and we all know—with adequate clothing and so forth—this day was nearing the freezing temperature, the weather had no significance, so one of the problems which Dr. Hirschfeld rests his opinion on isn't there.

The second thing is the so-called "strenuous work". We don't know what Mr. Rose may have said to to Dr. Hirschfeld, but we do know what Mr. Rose testified to both here and in his deposition and to what Mr. Belland has testified to as to what the actual work conditions were. And we don't see any evidence of strenuous work. Mr. Rose has been a heavy-duty Diesel mechanic for twenty-odd years. His deposition establishes, his testimony today acknowledges that he has done physical work. He expected the hours that he did work, and, in fact, the three days preceding he was working a ten-hour day and he got all the sleep he needed. There was nothing physically strenuous about that job . . .

[End of tape]

lifted some batteries. He did indicate that that was, I think he said at least an hour or so before he had his heart attack, and there was nothing during that time that seemed to bother him any, so—and this is consistent with—and that's why I recommend that you read Dr. Wilson's deposition very carefully because he goes into some detail about what you are looking for.

In terms of a physical causation you have to look for some extreme exercise or stress that really puts a lot of physical energy expending by the body and puts a lot of stress on the heart. He talks in terms of foot pounds of energy of work that someone is doing more than they're used to working where, actually, it cuts down the blood flow. If, and there is a dispute on this, but if Mr. Rose lifted those batteries it was consistent with what he was used to, and he'd done it several hours before, and over an hour or so. Period. He would lift a battery or two for this truck. He would work on it for a while and I think he said from an hour to an hour and a half per truck—and go to the next truck. Now, I would suggest to you that that apparently did not cause him any stress and strain because of his life-time activity and other reasons. He didn't complain of anything, didn't seem to have any problems, and so there is no basis to say that that somehow caused a heart attack which occurred at 2 o'clock in the afternoon after he had lunch, when he was basically climbing into a truck or walking around it, according to his deposition, but in any event not doing anything that was extraordinary or extra-stressful of any kind.

Now Mr. Belland who was also there, testified slightly differently from what Mr. Rose had testified. And I suggest that you review that also. Mr. Belland has indicated that the hours were basically a 10-hour day. He indicated that perhaps Mr. Rose during the three-months he was there might have worked perhaps ten times in the evening beyond that regular schedule. He didn't believe that Mr. Rose worked the extraordinary long hours that perhaps Mr. Rose is contending. Everybody got enough rest, according to him, and Mr. Rose himself has testified that he certainly

had enough rest for at least three days running before the thing.

Mr. Belland talked about the temperature. The shop was heated. That's not in dispute. There was adequate warmth within the shop and, of course, they had clothing outside.

Mr. Belland did not recall any heavy lifting of batteries that morning. He did recall they were starting them, they were bringing over jumpers and so forth. They were moving around, but this is consistent with the kind of physical activity that people who are heavy-duty mechanics are used to. He didn't recall any significant heavy lifting. He was working as a partner with Mr. Rose. The only lifting that he can recall was a battery charger which is not as heavy as a battery, that Mr. Rose was going to lift but which Mr. Rose didn't, because apparently at that point he had these pains and this discomfort before the battery charger had been moved and therefore the inference was clear that Mr. Rose had not been able to or chose not to because he didn't feel well. That was the only thing that was to be lifted.

Going back to Dr. Hirschfeld again, while he came to the medical opinion in which he said stress in terms of possibility but he certainly thought that that was probably what happened. He also did indicate, however, in his deposition, other factors, the heavy smoking history of Mr. Rose, was considered significant, by Dr. Hirschfeld and, of course, by Dr. Wilson as well as it relates to causes. He indicated, of course, and this is concurred in by Dr. Wilson, that Mr. Rose must have had pre-existing—well, occulsion of the arteries and so forth, atherosclerosis for many years. Dr. Wilson talked in terms of—Dr. Wilson said Dr. Hirschfeld said at least two years. I think he said

more than that. He said no-one knows exactly what causes a myocardial infarction. They're the actual death of the heart tissue at that time. He talks in terms of the work, the hard work he was doing. So he's saying, Dr. Hirschfeld is saying there has to be a correlation between the actual heart muscle death at that moment which is when the nausea, pain and so forth comes on, and some amount of work the heart is doing, and this would relate to the entire body, where the body is doing a lot of physical exercise more than perhaps it is able to do, and that, of course, could be correlated to heavy physical labor and you could correlate breathing rates, heart rates and so forth. There isn't any evidence of that occurring at that moment. Now I would suggest that absent that we are back to the situation of the heart attacks which occur statistically around the clock, at sleep as well as at rest, and neither doctor, nor apparently, medical science either, can say with any confidence why is it that it happens at this moment as opposed to that moment. They are not able to tell us that.

Now, Dr. Hirschfeld's deposition was taken and, significantly, he did not mention—attach any significance to the lack of sleep, a contention which Mr. Rose is making. There is nothing in his deposition about that as being a cause.

For the summary, I think if you compare the two witnesses who were there, Mr. Rose and Mr. Belland, you'll find basic agreement on the fundamental factors, a substantial time lag anywhere from three hours, or, say, two hours to one hour for any kind of physical activity to the time when the actual heart attack occurred when Mr. Rose was basically just walking around. There is no significant

difference on that, and I would suggest that the previous matters that are in dispute as to whether they worked long hours in January or not has really no significance to whether Mr. Rose suffered a heart attack, or was the cause of that heart attack in late March when it was acknowledged by him of getting sufficient rest, sufficient food—there is no question of that either although there was an inference in his testimony. The deposition clearly establishes that he ate well. Nobody was starving. They had all the food they needed. There was no suggestion in either medical opinion that food, too much food, too little food or any amount of food had any relation to his heart attack, so we suggest that there is no factual basis to tie with any sort of medical certainty, Mr. Rose's very unfortunate heart attack to anything on that job. It's not supported by the facts that he has testified to. It's not supported by the medical opinions and while it is unfortunate, the Board did indicate in one earlier case, the Board's words, that workmen's compensation is different from health insurance. It is unfortunate. Mr. Rose certainly needs medical care and so forth, but workmen's compensation, I would suggest, is not the appropriate remedy for it.

That concludes my comments in regard to causation. Of course, I have indicated that I would like to keep it open on the other matter, depending on the Board's determination of course, if there is anything further as it relates to his present condition.

Thank you.

Mr. Erwin: The case of *Bernard Schoen vs. Industrial Indemnity Co., and others*, was a case in which the man who had the heart attack had it at 2 o'clock in the morning off the job, and reported to the hospital at that time. The

significant facts were that he was handling certain amounts of steel in the morning in which he had some unusual amounts of exertion, turned pale, sweated, and, in general, asked to go because he felt ill, and finally at the end of the day, 4:30, he was allowed to go home. Suffered the actual onset of the heart attack at 2 o'clock in the morning some ten to twelve hours after he left the job. The Board considered the amount of activity that was raised by that situation in the particular time, the stress and strain which he testified to at the job that he was under, the particular type of refusal of the people to allow him to leave until his normal day was over, and the, in general, full testimony indicating that he had arrived at and was some illness which nobody had testified was a specific heart attack, and the Board so found underneath the circumstances, that the illness probably was caused in the course and scope of his employment because of that situation found that he could have had a heart attack at 2 o'clock in the morning on that particular day from the stress and strain that was over at that situation based on the so-called "ordinary incidents" of work that he was handling since he was a steel worker required to handle those at some time during the periods of time that he was working for Stack Steel Corporation. Now, what we just had a recitation here is that this man in the normal course of business can't exert himself because this is the normal type of thing that a heavy-equipment operator does, and that's nonsense. The picking up of a fifty-pound battery 1, 2 and 3, can raise his blood pressure from a period of forty-five to two minutes and if he does it for a period of time it is entirely possible, if he's got pre-existing disease, as we have not contended that he does not, that it might not be significant for a

period of time greatly longer than the time limits that are involved here, and the doctors so allow. As a matter of fact, Dr. Wilson says that a man has time enough to have the incidence occur to him and drive all the way to Wasilla from Valdez and have a heart attack after he has had a heavy meal and gone to bed. Now, if time limits are the requirement and the ease in which it's done and the matters of what we are talking about here are variable according to the opinions of the doctor, then you may take those into consideration also in deciding what legal cause is, and having done so in previous times the so-called "rule" of immediate heavy exertion then takes a broader meaning than the narrow one contended for here and extends to the full circumstances of the man's working conditions which we attempted to pursue and testify here to. Because it is undoubtedly clear if you review the circumstances testified to here before that for twenty years this man worked in the States under conditions that were not anywhere remotely similar to the ones he got into at Fairbanks for two and a half months and that the pressures on that situation develop, as Dr. Wilson says, can happen any time. Why can't they develop over 2½ points [sic] until he has a heart attack? Why isn't that significant in a raise of activity and other matters? It is certainly as creditable a fact as any of the ones cited to touch off the heart attacks in the previous cases.

Mr. Gaskill: Anything further? [Pause] There being nothing further we will go off the record.

[End of hearing]

Appendix E

§ 3600. Conditions essential

(a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence.

(4) Where the injury is not caused by the intoxication of the injured employee.

(5) Where the injury is not intentionally self-inflicted.

(6) Where the employee has not willfully and deliberately caused his or her own death.

(7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

(8) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activ-

ities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post such a notice shall not constitute an expression of intent to waive the provisions of this subdivision.

(b) Where an employee, or his or her dependents, receives the compensation provided by this division and secures a judgment for, or settlement of, civil damages pursuant to those specific exemptions to the employee's exclusive remedy set forth in subdivision (b) of Section 3602 and Section 4558, such compensation as is paid under this division shall be credited against the judgment or settlement, and the employer shall be relieved from the obligation to pay further compensation to, or on behalf of, the employee or his or her dependents up to the net amount of the judgment or settlement received by the employee or his or her heirs, or such portion of the judgment as has been satisfied.

Amended Stats 1978 ch 1303 § 5; Stats 1982 ch 922 § 4.

§ 5810. Review by courts

The orders, findings, decisions, or awards of the appeals board made and entered under this division may be reviewed by the courts specified in Sections 5950 to 5956 within the time and in the manner therein specified and not otherwise.

Enacted 1937; Amended Stats 1965 ch 1513 § 167, operative January 15, 1966.

§ 5900. Petition for reconsideration

(a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a referee under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. Such petition shall be made only within the time and in the manner specified in this chapter.

(b) At any time within 60 days after the filing of an order, decision, or award made by a referee and the accompanying report, the appeals board may, on its own motion, grant reconsideration.

Enacted 1937; Amended Stats 1951 ch 778 § 13; Stats 1965 ch 1513 § 171, operative January 15, 1966.

§ 5901. Reconsideration as prerequisite to court action

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a referee shall accrue in any court to any person until and unless the appeals board on its own motion sets aside such final order, decision, or award and removes such proceeding to itself or such person files a petition for reconsideration, and such reconsideration is granted or denied. Nothing herein contained shall prevent the enforcement of any such final order, decision, or award, in the manner provided in this division.

Enacted 1937; Amended Stats 1951 ch 778 § 14; Stats 1965 ch 1513 § 172, operative January 15, 1966.

§ 5950. Writ of review; Application

Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration. The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.

Amended Stats 1978 ch 661 § 1.

Appendix F

Sec. 23.30.120. Presumptions. In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter;

(2) sufficient notice of the claim has been given;

(3) the injury was not occasioned solely by the intoxication of the injured employee;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill himself or another. (§ 19 ch 193 SLA 1959)

Section 23.30.125. Review of Compensation Order.

(a) A compensation order becomes effective when filed in the office of the board as provided in § 110 of this chapter and, unless proceedings to suspend it or set it aside are instituted as provided in (c) of this section, it becomes final on the 31st day after it is filed.

(b) If an application for review is made to the board within 10 days from the date of an award, by less than all the members, the full board, if the first hearing was not held before the full board, shall review the evidence or if considered advisable, shall hear the parties at issue and the representatives and witnesses as soon as practicable. The board shall make and file an award with the findings of fact on which it is based, and send a copy to each of the parties immediately.

(c) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings in the Superior Court brought by a party in interest against the board and all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending final decision in the proceeding unless upon application for an interlocutory injunction the court on hearing, after not less than 3 days, notice to the parties in interest and the board, allows the stay of payment, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing a stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference to it, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) If an employer fails to comply with a compensation order making an award that has become final, a beneficiary of the award or the board may apply for the enforcement of the order to the Superior Court. If the court determines that the order was made and served in accordance with law, and that the employer or his officers or agents have failed to comply with it, the court shall enforce obedience to the order by writ of injunction or by other proper process to enjoin upon the employer and his officers and agents compliance with the order.

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, may not be instituted except as provided in this section and § 170 of this chapter.

Sec. 23.30.265. Definitions. In this chapter

(1) "adoption" or "adopted" means legal adoption before the time of the injury;

(2) "board" means the Alaska Workers' Compensation Board;

(3) "carrier" means a person authorized to insure under this chapter and includes self-insurers;

(4) "child" includes a posthumous child, a child legally adopted before the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year before the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him;

(5) "grandchild" means a child as defined in (4) of this section of a child as defined in (4) of this section;

(6) "brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but do not include married brothers and married sisters unless wholly dependent on the employee;

(7) "child," "grandchild," "brother," and "sister," include only persons who are under 19 years of age, persons who, though 19 years of age or over, are wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability, and persons of any age while they are attending the first four years of vocational school, trade school, or college, and persons of any age while they are attending high school;

(8) "compensation" means the money allowance payable to an employee or his dependents as provided for in this chapter, and includes the funeral benefits provided for in this chapter;

(9) "death" as a basis for a right to compensation means only death resulting from an injury;

(10) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

(11) "employee" means an employee employed by an employer as defined in paragraph (12);

(12) "employer" means the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;

(13) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection which arises naturally out of the employment or which naturally or unavoidably results from an accidental injury, and includes breakage or damage to eyeglasses, hearing aids, dentures, or any prosthetic devices which function as part of the body and further includes an injury caused by the wilful act of a third person directed against an employee because of his employment;

(14) "insurance commissioner" refers to the person who heads the insurance division or section of the Department of Commerce and is charged with the administration of the state insurance laws;

(15) "married" includes a person who is divorced but is required by the decree of divorce to contribute to the support of his former spouse;

(16) "medical and related benefits" includes but is not limited to physicians' fees, nurses' charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation, and treatment for the fitting and training for use of such devices as may reasonably be required which arises out of or is necessitated by an injury, and transportation charges to the nearest point where adequate medical facilities are available;

(17) "parent" includes stepparents and parents by adoption, parents-in-law, and a person who for more than three years before the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee;

(18) "physician" includes doctors of medicine, surgeons, chiropractors, osteopaths, dentists, and optometrists;

(19) "self-insurer" means an employer who instead of insuring his liability under this chapter as it provides, elects to pay directly the compensation provided for, and who has furnished to the board satisfactory proof of his financial ability to make the direct payments;

(20) "wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, and includes the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer;

(21) "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death, or living apart for justifiable cause or by reason of his desertion at such a time;

(22) "widower" includes only the decedent's husband living with or dependent for support upon her at the time of her death, or living apart for justifiable cause or by reason of her desertion at such a time;

(23) "prosthetic devices" includes but is not limited to eye glasses, hearing aids, dentures, and such other devices and appliances, and the repair or replacement of the devices necessitated by ordinary wear and arising out of an injury;

(24) "volunteer fireman" means an individual whose name is registered with the state fire marshal as a member of a regularly organized volunteer fire department or who serves with a full-time fire department on a temporary, voluntary basis;

(25) "regularly organized volunteer fire department" means a volunteer fire department registered with the state fire marshal which has official recognition and financial support from the political subdivision where it is situated;

(26) "volunteer policeman" means an individual who serves as a peace officer with a full-time police department of a general law or home rule municipality on a temporary, voluntary basis;

(27) "volunteer ambulance attendant" means an individual who serves as an ambulance attendant on a temporary, voluntary basis with a volunteer or full-time fire department or municipal ambulance service of a general law or home rule municipality;

(28) "reserve rate" means the unencumbered second injury fund balance on October 31 of each year as a percentage of disbursements from the second injury fund

during the 12-month period ending on June 30 of the same callendar year. (§ 2 ch 193 SLA 1959; am ch 148 SLA 1962; am §§ 3—5 ch 74 SLA 1963; am § 11 ch 46 SLA 1964; am § 4 ch 99 SLA 1966; am § 2 ch 41 SLA 1968; am § 1 ch 54 SLA 1969; am §§ 90, 91 ch 127 SLA 1974; am § 3 ch 77 SLA 1979; am § 60 ch 94 SLA 1980; am § 4 ch 59 SLA 1981)

83-262

No. .....

IN THE

Supreme Court of the United States

October Term, 1983

CHEECHAKO LEASING COMPANY,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD
and JUNE FRED ROSE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a "final judgment" by the Courts below has been rendered for the purpose of certiorari jurisdiction of this Court.

2. Whether an Alaska Workers' Compensation Board decision, based on that state's standard of industrial causation as a prerequisite to entitlement, precludes a subsequent consideration of entitlement by the California Workers' Compensation Appeals Board under California's standard of industrial causation, by virtue of the operation of the Full Faith and Credit Clause of the United States Constitution.

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TABLE OF AUTHORITIES CITED

Cases

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IN THE

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CHEECHAKO LEASING COMPANY,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's prejudicial summary of the pertinent facts of this case compels Respondent to offer the capitulation of facts.

Respondent did in fact file on August 11, 1976, in the State of California, an application for adjudication of his claim alleging an industrially induced heart attack suffered in Alaska while in the employ of a California employer, i.e., the Petitioner.

On September 30, 1976, Respondent filed a similar application with the Alaska Workers' Compensation Board relating to the same injury.

The Alaska Board heard Respondent's claim on July 4, 1979. The principal issue was indeed whether or not the heart attack was job related. On September 26, 1979, the Alaska Board, in its Preliminary Finding on Decision and Order, held against Respondent, due to the absence of evidence that the heart attack was the result in "unusual exertion."

In the California proceeding, Petitioner's motion for dismissal for want of jurisdiction under the Full Faith and Credit Clause of the United States Constitution was heard before the California Workers' Compensation Appeals Board on June 10, 1980. In its October 3, 1980, Finding on Jurisdiction, the Board noted that California had "great interest" in the matter, and further that Alaska's "unusual exertion" requirement was "much more conservative than California's," and held that it had jurisdiction to hear the case, in order to determine whether the injury was compensable under California law.

Petitioner subsequently filed a timely Petition for Reconsideration of the Board's decision. Reconsideration was granted and jurisdiction ultimately upheld by the Workers' Compensation Appeals Board in its Opinion of July 13, 1983. Relying on *Thomas V. Washington Gas Light Company*, 448 U.S. 261, 65 L. Ed. 2d 757, 100 S. Ct. 2647 (1980), the Board upheld California's jurisdiction, holding that inasmuch as the Alaska finding of unusual exertion was not a California prerequisite of compensability, Respondent's California remedies were not barred by the Full Faith and Credit Clause of the United States Constitution.

On February 23, 1983, the Court of Appeal of the State of California denied without comment Petitioner's Petition for Writ of Review. The Supreme Court of the State of California also denied without comment Petitioner's Petition for Hearing on May 19, 1983.

REASONS FOR DENYING PETITION

1. A "final judgment" has not been rendered, and certiorari jurisdiction is therefore absent.

The final judgment analysis and rule precludes review where " . . . anything further remains to be determined by the State Court, no matter how disassociated from the only Federal issue that has been finally adjudicated by the highest court in this state." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945).

In the instant case, the effect of the holding of the Supreme Court of the State of California was to uphold the Board's finding of jurisdiction to adjudicate Respondent's substantive claims to California remedies under its laws. In his Opinion on Decision filed in conjunction with Finding on Jurisdiction, the Judge stated explicitly that he was " . . . only finding California has authority and jurisdiction to hear the matter and determine whether if under California law and precedent there is a compensable injury."

This finding leaves wholly untouched the substantive merit of Respondent's claim. It might be characterized as either preliminary or interlocutory, but it clearly fails the definition of "finality" as articulated in *Radio Station WOW, Inc., supra.* Nor is it saved by any of the recognized exceptions of this test, two of which have been cited by Petitioner in its brief.

Petitioner relies on third and fourth categories of exception articulated by this Court in *Cox Broadcasting vs. Cohn*, 420 U.S. 429, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). Respondent submits that Petitioner's

citation of *Cox*, and its exceptions to the finality rule is inapposite.

Cox's third category of exception, relied on by Petitioner, embraces those cases presenting each of three component parts:

1. The federal claim has been finally decided;

2. Further state proceedings on the merits are pending; and

3. Later review of the federal issue cannot be had, whatever the cases ultimate outcome may be.

This case fails to present all three component parts.

While the federal claim has been "finally decided," by virtue of the State Supreme Court's refusal to hear the Petitioner, and further state proceedings on the merits of Respondent's claim are in fact pending, it cannot be said that governing state law prevents Petitioner from presenting his federal claims for review. This Court in *Cox* cited *California v. Stuart*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) as the "epitome" of such a case:

> ". . . although the state might have prevailed at trial, we granted its Petition for Certiorari and affirmed, explaining that the state's judgment was 'final' since an acquittal of the defendant at trial would preclude, under the law, an appeal by the state."

In *California v. Stuart*, the Petitioner risked forfeiture of its appellate rights in state courts by proceeding on the merits. Petitioner's attempt to draw an analogy between his position and that of the Petitioner in *California v. Stuart* fails due to the total absence

of congruity on this key point. In the instant case, Petitioner, unlike the state in a criminal proceeding is not precluded from taking an appeal from an adverse decision. Therefore, the third category exception of *Cox* cannot appropriately be applied to this case.

Nor can it be maintained that the fourth category exception of *Cox* pertains here. This exception applies under certain specified circumstances, when ". . . a refusal *immediately* to review the State Court decision might *seriously* erode federal policy . . ." (*Cox*, *supra*, 43 L. Ed. 2d, at page 342, emphasis added).

Although Petitioner has cited in support of its Petition this exception, it has not even attempted to identify the federal policy at risk, as mandated by the Court's definition of the fourth category exception. Without articulation of such a policy, it is, of course, impossible to evaluate whether failure to *immediately* grant review risks *serious* erosion of any such policy. For this reason, the fourth exception must also fail.

Neither of the final judgment exceptions put forward by Petitioner fit the facts of this case. In the absence of any of the recognized exceptions, review of this case, for the reasons stated above, is precluded under the general final judgment rule.

2. The Full Faith and Credit Clause of the U.S. Constitution does not preclude a consideration of Respondent's claim by the California Workers' Compensation Appeals Board.

In denying Respondent Rose's application, the Alaska Workers' Compensation Appeals Board in its July and September, 1979, Decision explained that a finding of "unusual exertion" must be made in order

to characterize a heart attack as being industrially related:

> "In order to be found compensable the heart attack must be the result of unusual exertion. Barring such evidence the Board has held in the past that it is of natural causes and not job related."

California does not require such a finding as a prerequisite for compensable heart related injuries. (See *Opinion on Decision*, Honorable Alvin L. Dove, September 25, 1980 [Appendix A], at page one, and *Decision After Reconsideration* [Petitioner's Appendix A] Workers' Compensation Appeals Board, State of California, July 13, 1982). It should be noted that Petitioner offers no California authority contradicting either the opinion of Judge Dove or the Workers' Compensation Appeals Board.

Respondent would respectfully direct the attention of this Court to the summary of the opinions given in *Thomas v. Washington Gas Light Company*, 448 U.S. 261, 65 L. Ed. 2d 757, 100 S. Ct. 2647 (1980), by the Workers' Compensation Appeals Board in its Decision After Reconsideration, at page seven:

> "This is simply another way of saying that in the absence of statutory language to the contrary the remedies are cumulative.
>
> "A review of these opinions then establishes that even though there were separate plurality opinions, there was a consensus on the point that Full Faith and Credit principals do not preclude a workers' copmensation applicant from seeking cumulative remedies in two different states where the litigation in the second state does not involve a relitigation of the specific factual finding made in the first state."

As noted above, California and Alaska differ with regard to the necessity of a finding of "unusual exertion": In Alaska it is a prerequisite to recovery, in California it is not.

Because the requirements of entitlement to California workers' compensation benefits in this instance differ from those of Alaska in this regard, and since the remedies are cumulative, pursuit of California remedies does not necessitate relitigation of factual determinations previously made in Alaska.

Respondent Rose respectfully submits that this case falls squarely within the holding of *Thomas*, and that the California Workers' Compensation Appeals Board may consider his application without violating either the Full Faith and Credit Clause of the United States Constitution, or the principle of *res judicata*.

Respectfully submitted,

THE BOCCARDO LAW FIRM,
JAMES F. BOCCARDO,
Counsel of Record,
EDWARD J. NILAND,
Of Counsel,

Attorneys for Petitioners.

(Appendices follow)

APPENDIX A

JUNE FRED ROSE VS. CHEECHAKO LEASING COMPANY
ALVIN L. DOVE
Workers' Compensation Judge
September 25, 1980 Case No. SJ 52838

OPINION ON DECISION

Applicant, a resident of, and hired in California to work in Alaska, sustained a heart attack during the hours of employment in Alaska on March 29, 1976. He filed Application in California August 11, 1976, and in Alaska September 30, 1976. The latter was by document signed in California September 5, 1976.

Following hearing in Alaska, the Alaska Board found "The Applicant did not suffer from an accident or injury while on the job. *In order to be found compensable the heart attack must be the result of unusual exertion.* Barring such evidence the Board has held in the past that it is of natural causes and not job related. The Board specifically finds that there was no unusual exertion and therefore must deny the claim." See Preliminary Finding of Sept. 6, 1979. Apparently there was no Appeal in Alaska, and the denial was made final by Order of 6 May 1980.

Applicant is now attempting to proceed on his California Application.

Defendant alleges the matter should be dismissed before this California Appeals Board; that the Alaska proceedings are res judicata on the issue of injury, and is entitled to full faith and credit.

Applicant's attorney cites *Kerr vs. Sage Communications*, a panel decision cited in 7 California Workers' Compensation Reporter, Page 141. Undoubtedly, in our present matter, California has great interest in a resident who could possibly need State support in the future, and in fact has been paid substantial California unemployment disability benefits. There is no doubt of the fact jurisdiction would have been accepted if the Alaska case had not been heard and decided earlier, nor is there any question under the authorities, but that if there were a lesser award in Alaska, Applicant could have proceeded in California for higher benefits.

It does also appear, at least on the basis of the reason for the non-compensable finding in Alaska, "no *unusual* exertion," that Alaska's law is much more conservative than is California's.

(The Judge is not finding at this time, but will leave to later the question as to whether the exact finding in Alaska of no *unusual exertion* is binding evidence on such point in California, but only finding California has authority and jurisdiction to hear the matter and determine thereafter if under California law and precedent there is a compensable injury.) See *Thomas vs. Washington Gas Light Co.* decided June 27, 1980 by the U.S. Supreme Court, filed herein by Defendant with its Memorandum in Support of Motion to Dismiss.

The Judge feels it imperative to follow the panel decision above.

ALVIN L. DOVE
Workers' Compensation Judge

ALD:mm

APPENDIX B

ALASKA WORKMEN'S COMPENSATION BOARD
P. O. Box 1149 Juneau, Alaska 99811

J. FRED ROSE, *Applicant,* vs. CHEECHAKO LEASING CO., *Defendant.*	PRELIMINARY FINDING OF DECISION AND ORDER Case No. 76-03-0723

TO: J. Fred Rose, 183 Senter Road, San Jose, CA 95111

Paul Baer, Esq. 501 W. Northern Lights Blvd., Suite 201, Anchorage, AK 99503

Cheechako Leasing Company, 434 Third Street & Grachl, Fairbanks, AK 99701

Glen E. Miller, Esq., Crocker Plaza, Suite 800, 84 W. Santa Clara Street, San Jose, CA 95113

Alan Sherry, Esq., P. O. Box 4-1398, Anchorage, AK 99509

This matter was heard in Anchorage, Alaska on July 25, 1979:

The Board reviewed the evidence and made the following findings of fact.

1. The applicant did not suffer from an accident or injury while on the job. In order to be found compensible the heart attack must be the result of unusual exertion. Barring such evidence the Board has held in the past that it is of natural causes and not job related. The Board specifically finds that there was no unusual exertion and therefore must deny the claim.

DECISION AND ORDER

All claims for compensation are denied and dismissed.

This is not a final decision and is therefore not binding upon the parties or subject to an appeal to the Superior Court. No findings of fact or conclusions of law have been prepared. A formal decision, with findings of fact and conclusions of law will be prepared unless both the claimant and the defendants waive their right to have such a decision issued. Waiver of said right may be exercised by execution of the stipulation found enclosed with this Preliminary Notice of Decision and Order and return of said stipulation to the Board. If stipulations are not filed by both parties within twenty (20) days of the date of the Preliminary Notice of Decision and Order, the Board shall assume that a formal decision is necessary and shall commence preparation of the same. If stipulations are filed by both parties, the Preliminary Notice of Decision and Order shall constitute a final decision of the Board.

Dated at Juneau, Alaska, this 26 day of September, 1979.

ALASKA WORKMEN'S COMPENSATION BOARD

s/Alton Gaskill

Alton Gaskill, Designated Chairman

s/Catherine Rigstad

Catherine Rigstad, Member

s/Jim Robison

Jim Robison, Member

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of J. Fred Rose, applicant vs. Cheechako Leasing Co., defendant and Alaska Pacific Assurance Company, carrier; Case No. 76-03-0723; dated and filed in the office of the Alaska Workmen's Compensation Board at Juneau, Alaska this 27 day of September, 1979.

Dottie Mills

Clerk-Typist